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Husbands & (and) Wives, Dangerousness & (and) Dependence: Public Pensions in the 1860s-1920s

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HUSBANDS & WIVES, DANGEROUSNESS & DEPENDENCE: PUBLIC PENSIONS IN THE 1860S–1920S

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I. INTRODUCTION

Everyone needs a wife. That is, we all could use a person in our lives who fits the once-idealized image of a wife: doing the laundry, cooking, caring for children, arranging medical appointments, managing a social life, and attending to emotional needs. In this list of what makes one a wife in a marriage, the most established of heterosexual institutions, I have not included heterosexual intercourse. Heterosexuality entails much more than who is sexually involved with whom, and anyone who has ever said she needs a wife knows that.

The purpose of this article is to discuss meanings of heterosexuality in the context of state benefits, focusing on the emergence of benefits in the nineteenth century. Not only did the late-nineteenth century engender the emergence of state benefits alongside expanding state employment, but that period also fostered an understanding of heterosexuality or homosexuality as a characteristic of individuals, rather than a description of behavior. Appellate courts, when determining who could receive benefits, considered proper family roles in deciding whether people had earned state payments or could only gain them as a matter of charity.

Because an understanding of fixed sexual identities was just being created in the latter part of the nineteenth century, it is anachronistic to impose categories of heterosexuality on the state's evaluation of wife and husband. However, I am not trying to understand distribution of state benefits on its own terms, but rather as a way of addressing state definition of marriage.

Benefits programs merit examination for two reasons. First, by the 1890s federal civil war pensions comprised over forty percent of the federal budget.[1] Second, pensions premised upon post-retirement payment for services rendered constitute the ongoing model for pensions many workers today receive through employers and for old age social security payments. The latter part of the nineteenth century saw a significant reconstitution of governance, with states expanding civil service employment and changing from a format of segmented politics, in which those

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1. *See* Megan J. McClintock, *Civil War Pensions and the Reconstruction of Union Families*, 83 J. AM. HIST. 456, 458 (1996).

who specifically benefited paid for the benefits, to a system that assumed that state payments, when justified, benefit society as a whole.[2] As a result, states began to seriously and more explicitly examine the values of work and state benefits, which illuminated what it meant to serve society by emphasizing qualities of masculinity.

This article first discusses ambiguities in understanding what signifies heterosexuality and homosexuality. This article then examines the administration of Civil War pensions in the late-nineteenth century. The article closes with an analysis of decisions concerning the constitutionality of pensions.

II. STRAIGHT AND QUEER

Adrienne Rich, in her generative article on compulsory heterosexuality,[3] argues that there is a lesbian continuum: that many women live rather closely with other women.[4] Women have friendships with other women, work with other women, gossip with other women, live with other women, share child care with other women, and are sometimes sexually involved with other women. It is only the latter that guarantees that one will be counted as lesbian; everything else is simply what we expect of all women in this culture. Rich's work implies two possible explanations for the fact that women's lives closely revolve around other women though most women identify as heterosexual. First, pressure to be heterosexual is so overwhelming that we simply cannot know how women would understand and define their sexuality without such pressure.[5] Alternatively, women are naturally and essentially lesbian, and that cultural heterosexuality requires the apparatus of social pressure and coercion to keep women from primarily sharing our lives with other women.[6] The latter reading suggests an essential sexuality, that there is no ambiguity and uncertainty in how one sexually identifies. Rich leaves unanswered the question of whether this structure is biologically or socially created: who wouldn't want to live with women? Rich argues that given the range and magnitude of social pressure to be straight, combined with the varied penalties for living primarily with other women, heterosexuality is compulsory.[7] Therefore, historically we can not know what sexual identity women would have chosen in the absence of wage

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2. *See generally* ROBIN EINHORN, PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO 1833–1872 (1991) (discussing the evolvement of Chicago's economic policy).

3. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* THE LESBIAN AND GAY STUDIES READER 227 (Henry Abelove et al. eds., 1993).

4. *See id.* at 239.

5. *See id.* at 229.

6. *See id.* at 235.

7. *See id.* at 241.

disparities between men and women, societal discrimination, witch burnings, and patriarchal control of law, theology, and science.[8]

Recently, queer theory has attempted to shift the focus of sexual identity analysis away from an examination of the people for whom one feels sexual desire—which could include many different people—and those with whom one is sexually involved—which at any particular time could be no one.[9] The people we sexually desire or with whom we are sexually involved do not define or exhaust our whole lives. In recent popular culture, the wide variety of indicators of straightness or gayness have been noted, particularly with regard to gay men.[10] In a radio broadcast, Dan Savage discussed going to his first workshop on adoption after he and his boyfriend had decided to adopt.[11] The workshop began by urging couples to deal with their infertility, a problem common to many, but not all, heterosexual couples seeking adoptive children.[12] Savage noted that he and his boyfriend could have skipped this part of the orientation.[13] They had always accepted as fact that they could not biologically have children, rather than as something that ran counter to their expectations and visions of what their lives would be.[14] Both straight and gay couples could not conceive children without becoming entangled in a complicated arrangement with a third party to make one of the partners a biological parent. The language of the seminar about infertility, Savage argued, was the language of coming out.[15] Couples were urged to tell their friends and family of their situation, to accept what they could not change, and eventually see it as a positive, new way of making a family.[16] Just as the straight couples shared in an element of gayness, Savage argued he and his boyfriend were appearing a little bit straight by adopting a child and creating a nuclear family. Savage argued against seeing the desire to have children as gay or straight.[17]

If straight and queer are sometimes difficult to define, and if they blur, it might be useful to examine where and how the terms are made explicit. What is it that makes people straight or queer? How have legal

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8. *See id.* at 231.

9. *Cf.* Judith Butler, *Imitation & Gender Insubordination*, *in* INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 13 (Diana Fuss ed., 1991) (discussing the impossibility of defining "lesbian"); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1599–1601 (pointing out the limitations of defining homosexuality by sexual desire).

10. *See, e.g.*, IN AND OUT (Paramount 1997) (exploring the implications of stereotypically gay behavior); *see also Ellen* (ABC television broadcast, 1997) (drawing attention to lesbian existence).

11. *All Things Considered: Gay Adoption* (National Public Radio broadcast, Dec. 19, 1997) (transcript information available at <http://www.npr.org/inside/transcripts> (visited Sept. 4, 1998)) [hereinafter *Gay Adoption*].

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

institutions categorized sexuality? When these questions are addressed, it is usually in terms of homosexuality. Andrew Koppelman argues that discrimination against gays and lesbians should count as gender discrimination on two grounds.[18] First, this kind of discrimination rests upon the belief that it is wrong for a man to do things with a man that it would be acceptable to do with a woman.[19] This reasoning has worked, to the benefit of gays and lesbians, in the European Court of Justice (ECJ),[20] which has recently held that discrimination against transsexuals is prohibited by the sex discrimination provisions of the Equal Treatment Directive. According to the ECJ, a person who is fired because she is undergoing or has undergone gender reassignment is being treated unfavorably in comparison with people of the sex to which she was born.[21] English courts have subsequently referred a case to the ECJ involving discrimination against a gay man based on the belief that the case regarding transsexuals almost certainly outlaws all discrimination on the basis of sexual identity.[22]

Second, Koppelman argues discrimination on the basis of sexual orientation should also be considered gender discrimination because gay men are often the victims of discrimination for behavior that is considered stereotypically female.[23] They are discriminated against as though they are women, although perhaps more aggressively because behavior that might be accepted for women is unacceptable for men. Similarly, lesbians are discriminated against for behavior that would seem appropriate for men.[24] Koppelman also argues that "the two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other."[25] For example, in *Price Waterhouse v. Hopkins*,[26] a prominent sex discrimination case, a woman was denied partnership because she needed to go to charm school and did

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18. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

19. *Id.* at 219.

20. The ECJ is a supranational court that judges disputes arising within the fifteen-member European Union under European Community law. *See* SALLY J. KENNEY, FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITIAN 78–83 (1992) (discussing the impact of the ECJ on British law). The Council of Ministers, which includes a representative from each member state, outlines directives that set objectives for the Union as a whole. *See id.* at 79–80. Directives allow member states choices in how to meet objectives. *See id.* The Equal Treatment Directive was enacted in 1976. *See id.* at 80.

21. *See* Case C–13/94, P v. S, 2 C.M.L.R. 247 (1996).

22. *See* R v. Secretary of State for Defence, *ex parte* Perkins, [1997] I.R.L.R. 297.

23. *See* Koppelman, *supra* note 18, at 202–03 (discussing how discrimination against homosexuals is part of the larger gender discrimination).

24. *Id.* at 245–46.

25. *Id.* at 235.

26. 490 U.S. 228 (1989) (superseded by 42 U.S.C. § 2000e–2 (1994) (making it unlawful for employers to classify employees or applicants for employment by race, color, religion, sex, or national origin in a way that would deprive that person of employment or adversely affect his or her status as an employee)).

not wear make-up.[27] Of course, women can also be discriminated against for seeming to be too feminine.[28]

Using the range of behaviors that constitute lesbian and gay identity as a basis for identifying someone as queer can work to put gay and lesbian identity at risk.[29] That is, a person can call herself queer without paying the public price of being explicitly paired with a same sex partner. Erasure does not have to be the only choice available in dismantling normative heterosexuality; as Suzanna Walters argues, it should be entirely possible for an individual to have a straight identity while being politically committed to equality with regard to sexual orientation.[30] Despite ambiguities in race and the recognition that race is not a sensible biological construct, we do not, as a matter of political and analytical argument, erase the categories of Black, White, Asian, and Latino.[31] Some queer theorists have emphasized "gender bending"[32] in sexual play, arguing that it is possible to have a queer heterosexuality in the sense that one might be heterosexually active while subverting standard gender norms of what it means to be feminine or masculine.[33] Such an argument gains strength as we note that an individual's sexuality is indeed marked in a number of ways in our culture.[34] Celia Kitzinger and Susan Wilkinson argue that the possibility of variety in sexual play does not mean that many people engage in it, and that few heterosexual women writing about sexuality believe that it is very possible to play with sexuality in a way that subverts gender norms.[35] They also argue that an emphasis on the range of play available to women who lead relatively privileged lives, who are less subject to financial and social pressures, ignores the compulsory nature of heterosexuality and straight gender norms that pervade the lives of many women.[36]

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27. *Price Waterhouse*, 490 U.S. at 235.

28. *See id.* at 251 (stating that stereotyping puts women in the intolerable position of never being able to advance).

29. *See generally* Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 SIGNS 830 (1996) (discussing the definitions of gay/lesbian issues and their effect).

30. *See id.* at 844–45.

31. *See id.* at 832–33.

32. *Cf.* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (illustrating that how effeminate men are regarded in society impacts the struggle against gender discrimination in general); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 30 (1995) (arguing that although the author is physically excluded from the category of lesbian, he includes himself to "poke at the sex/gender essentialisms that rigidly and absurdly confine us all").

33. *See* Eve Kosofsky Sedgwick, *Epistemology of the Closet*, *in* THE LESBIAN AND GAY STUDIES READER, *supra* note 3, at 45, 55.

34. *See generally id.* (discussing the concept of homosexuality through literature and culture).

35. *See* Celia Kitzinger & Susan Wilkinson, *Virgins and Queers Rehabilitating Heterosexuality?*, 8 GENDER & SOC'Y 444, 445, 457 (1994).

36. *See id.* at 459.

We could avoid the problem of erasing gay and lesbian identity by turning the focus to the markings of heterosexuality. Judith Butler writes in extraordinarily thought-provoking ways about confounding the fixed nature of sexual identity, but does not thereby suggest that identity is a matter of free play or that heterosexuality is not compulsory.[37] Instead, she argues for the importance of focusing on the masquerade of gender within heterosexuality rather than on lesbian identity.[38] The claim to a specific lesbian identity has been a "counterpoint to the claim that lesbian sexuality is just heterosexuality once removed, or that it is derived, or that it does not exist."[39] Claiming lesbian sexuality means accepting preconceived notions of lesbian identity, so that claiming lesbian identity is inherently accepting a subordinate status within a dominant heterosexuality, Butler bypasses the question of lesbian specificity, instead addressing the other half of the problem: the assumed authenticity of heterosexuality. She argues that "[c]ompulsory heterosexuality sets itself up as the original, the true, the authentic; the norm that determines the real implies that "being" lesbian is always a kind of miming . . . ."[40] An important move in queer theory would be to avoid the continued focus on what makes up a true lesbian identity in favor of trying to understand how heterosexuality is not natural, true, or essential.[41] If heterosexuality is not natural, true, or essential, then lesbianism cannot consequently be the tainted derivative of something true. Similarly, Lisa Duggan argues that focusing on the construction of gay and lesbian sexuality "tends to leave heterosexuality in its naturalized place."[42] Therefore, it is important to analyze the extent of heterosexual privilege established in law and public policy.[43] These approaches both avoid assuming an essential identity while at the same time refusing to focus on the range of play possible within heterosexuality—as Kitzinger and Wilkinson argue queer theory too often does.[44] Instead, the invitation is to focus on how ordinary heterosexuality is understood.

Butler's framework resolves some of the ambiguity in Rich's argument. It is simply not worth trying to determine if women's authentic sexuality rests with other women, as one reading of Rich would suggest. Instead, there is no true and authentic way to be gay, lesbian or straight, because all sexual identities are assumed. Butler argues:

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37. *See* Butler, *supra* note 9, at 21.

38. *Id.* at 17.

39. *Id.*

40. *Id.* at 20.

41. *Id.* at 20–21.

42. Lisa Duggan, *Queering the State*, 39 SOC. TEXT 1 (1994), *reprinted in* SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 179, 185 (Lisa Duggan & Nan D. Hunter eds., 1995) (subsequent citations to *Queering the State* will reference the article as reprinted in SEX WARS).

43. *See id.* at 186.

44. *See* Kitzinger & Wilkinson, *supra* note 35, at 458–59.

> There is no "proper" gender, a gender proper to one sex rather than another, which is in some sense that sex's cultural property. Where that notion of the "proper" operates, it is always and only *improperly* installed as the effect of a compulsory system. Drag constitutes the mundane way in which genders are appropriated, theatricalized, worn and done; it implies that all gendering is a kind of impersonation and approximation.[45]

If masculine characteristics do not naturally belong to men, and feminine characteristics do not naturally belong to women, we can attend to the work that goes into maintaining what are taken to be proper boundaries. However, analyses of compulsory heterosexuality in law have focused primarily upon sexual intercourse despite the range of ways sexuality and identities can be understood.[46]

Heterosexuality might be best understood by approaching it as a question of gender norms. Compulsory heterosexuality might not be primarily enforced via law regarding what constitutes sexual intercourse, but rather by what sets the context in which men and women are understood to be heterosexual. An analysis of the system of early benefit payments illustrates this point.

III. STATE BENEFITS FOR DANGEROUS PUBLIC SERVICE

This article discusses two major points related to nineteenth-century state payments' effect on heterosexuality: first, that the practicalities of gaining state benefits enforced heterosexuality by requiring women to associate with men, and second, that the law surrounding state payments articulated and enforced a notion of the "proper."[47] Pension payments went to men whom courts identified as acting appropriately through definitions of dangerous work. That this work was a performance is enhanced by imagined dangerousness, regardless of whether the work actually placed the performer in physical jeopardy.

Analyzing the availability of state benefits clearly involves discussing compulsory heterosexuality: women had to associate or live with men in order to receive payments.[48] Whatever room for complexity there might have been in one's living arrangements, as a matter of legal recog-

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45. Butler, *supra* note 9, at 21.

46. *See generally* Richard Collier, *"The Art of Living the Married Life": Representations of Male Heterosexuality in Law*, 1 SOC. & LEGAL STUD. 543 (1992) (discussing how the law has used marriage to define a "natural" sexual intercourse); Elizabeth M. Iglesias, *Rape, Race, and Representation: the Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996) (discussing how society defines rape and its impact on women's sexuality).

47. *See* Butler, *supra* note 9, at 21 (addressing "compulsory" gender norms).

48. Indeed, normative heterosexuality is well-established enough that I doubt it would be possible to find a case of a man even trying to claim benefits on the basis of his affiliation with another man, separate from being a son or father; particularly since marriage or something that mimicked marriage was required to claim benefits and marriage was defined as a heterosexual union.

nition, heterosexuality was enforced. However, understanding the masculine characteristics that allowed for the state benefits is a slightly different matter. By focusing on masculinity, we address Butler's point that gender is appropriated and approximated rather than intrinsic.[49] In addressing masculinity, we are no longer addressing sexual orientation—at least in the sense of sexual desire or who must live with whom to get state benefits. Instead, gender, usually the category we use for discussing masculinity and femininity, subsumes sexual orientation. In other words, whom one desires sexually constitutes merely one aspect of a person's gender. Yet focusing on masculinity and femininity would seem to erase lesbian and gay identity—an ironic result given that the emergence of more fixed state regulatory apparatuses in the late-nineteenth century in part conditioned the emergence of sexual identity.[50]

The framework of sexual identity, or of queer theory, could as easily be said to encompass the framework of gender. That is, instead of saying that all of sexual orientation concerns masculinity and femininity, which is in turn about gender, we could say that all of gender is about signaling masculinity and femininity, which is in turn about sexual orientation. Feminist theory has argued there is no essential human being called "woman" who shares characteristics across all women.[51] Where there are patterns of shared outlooks and characteristics, they are dependent on race and class position, as well as sexuality.[52] The fragmentation of a subject called "woman" has come from the challenges raised by members of marginalized groups, and that includes challenges raised from queer theory. As Eric Heinze argues, transsexuals, who have been at the forefront of challenges to discrimination on the basis of sexual identity in the European supranational courts, raise the most explicit challenges to "categories, such as gender, race, ethnicity, nationality, religion or language, as well as non-categories, such as the 'human family' or the abstract individual."[53] If, for example, birth certificates are not changed to reflect a transsexual's new sex, then marriage for a transsexual is, from the point of view of the state, same-sex marriage.[54]

Heinze argues that while it might be analytically useful to separate out discourses of classical sexology, gender, and sexual orientation, and while their theoretical bases have different origins, disjoining these frameworks eventually shows how they overlap.[55] When these discourses

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49. *See* Butler, *supra* note 9, at 21.

50. I am grateful to Eric Heinze for bringing this point to my attention.

51. *See, e.g.*, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN (1990) (recognizing that Western philosophy concerning "womanness" does not consider the vast, inherent differences of women).

52. *See, e.g.*, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT (1991) (centering the analysis deliberately on African-American women).

53. Eric Heinze, *Discourses of Sex: Classical, Modernist and Post-Modernist*, 67 NORDIC J. INT'L L. 37, 72 (1998).

54. *See id.* at 68.

55. *See id.* at 40.

are separated, they are only so in their most polar versions; once one complicates an understanding of gender, one is quickly in the midst of discussions of queer theory. As Heinze puts it, "[f]or no sub-discourse within any of the three sites truly can be understood as irrelevant to the other two sites. Appearing, perhaps, to bypass ('disjoin') the other two sites, a disjunctive sub-discourse in fact collapses ('conjoins') these into itself."[56] Rather than this leading to the meaninglessness of the categories, Heinze argues that it would instead be useful to proliferate categories by joining them together.[57] He maps the discourse of sexual orientation onto postmodernist forms of knowledge, which emphasize the fragmentation of the legal subject.[58] He argues that the feminist project, in contrast, emerged more from the emphasis on programmatic modernism embodied in arguments for universal human rights.[59] Heinze also argues that the very artificiality of these conjunctions invites us to proliferate the categories: that it would be helpful to think about what it might look like to explore and link liberal, modernist, and postmodernist perspectives about gender, sexuality, and orientation.[60]

In a different context, that of understanding the conjunction of local with global, Donna Haraway also argues for the usefulness of using categories whose very artificiality is evident: it will keep us from deluding ourselves that we are discussing something real, concrete, and separable from everything else.[61] With these points in mind in the forthcoming discussion of the enforcement of heterosexuality in pensions law I do not mean to analyze which assumptions are about gender and which are about heterosexuality. I am not convinced they are wholly separable, though for some purposes the distinctions might be important. Instead, I argue that characteristics we would associate with gender, such as courage for men and dependence for women, concern sexual orientation. In court cases, the characteristics of socially gendered masculinity or femininity arose in situations where courts also assumed these characteristics to be important because men, women, and children were in heterosexual families, or should be.

In addressing masculinity, femininity, and assumptions about family, we do not resolve some questions, such as what it really means to be "straight," and if heterosexual desire ever authentically belongs to women. But in keeping with analyses that view sexuality as about much more than for whom one has sexual desires, we can analyze the maintenance in law of heterosexuality as a set of beliefs about how men and women should live together. These laws have enforced a normative het-

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56. *Id.* at 48–49.
57. *Id.* at 40.
58. *Id.* at 62–67.
59. *Id.* at 56–60.
60. *Id.* at 73–75.
61. Donna J. Haraway, *Reading Buchi Emecheta: Contests for "Women's Experience" in Women's Studies*, *in* SIMIANS, CYBORGS AND WOMEN 109, 111–13 (1991).

erosexuality, formalizing relationships that might have once been informal and more fluid.

While the law of state benefits enforced a heterosexual and monogamous version of family, it nonetheless allowed some social space for making things up as one went along. Legal categories did not regulate everything. To the extent that homosexuality was not identified as a quality of individuals until the late-nineteenth century in the United States,[62] women could and did arrange their lives so that they could live together with each other, and they could do so under very little public scrutiny or disapproval.[63] D'Emilio and Freedman discuss same sex couples who lived married lives between the 1850s and 1870s.[64] In each couple, one partner took on the position of husband or wife in a way that fit established heterosexual practices, but also took on a position different from what might have been signified by biological sex.[65] Butler's notion that all of gender is a "drag,"[66] even if it is not one that people can take off or put on at will, makes it difficult to say that the partnerships D'Emilio and Freedman describe are straight or gay/lesbian. To argue the latter imputes tremendous significance to biological sex and much less to what we take seriously in the social world. Furthermore, D'Emilio and Freedman argue that to impose categories of heterosexuality or homosexuality is exactly that: an imposition, because such categories were not common ways of categorizing people until the late-nineteenth century.[67]

In the nineteenth century, women could very rarely earn enough to support themselves.[68] Also, understandings of what it meant to be a proper wife were enforced even where married women earned their own wages; they were enforced in a way that made it difficult for women to protect their earnings from husbands.[69] Not until 1887 did most states have statutes protecting married women's access to their own wages.[70]

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62. JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 121 (1988); *see also id.* at 128–29 (discussing Walt Whitman as an example of nineteenth-century romance between same sex friends).

63. *See id.* at 121.

64. *Id.* at 124–27.

65. *See id.* at 127.

66. Butler, *supra* note 9, at 18–21.

67. *See* D'EMILIO & FREEDMAN, *supra* note 62, at 121, 123.

68. *See id.* at 124–25.

69. *See* Valentine v. Tantum, 32 A. 531, 531–32 (Del. Super. Ct. 1886), *cited in* Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 471 (1988) (outlining the state of women's property rights at common law prior to the enactment of the "Married Woman's Act" and noting that married women had no right to contract at common law).

70. *See, e.g.*, Act to Protect the Rights of Married Women, 1861 Colo. Sess. Laws 152, 152 ("[A]ny married woman, while married, may bargain, sell and convey her personal and real property, and enter into any contracts in reference to the same as if she were sole."); *see also* Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880,*

Indeed, many courts interpreted the statutes so that women could only keep their wages if they lived separately from their husbands.[71] They could not keep wages necessary for domestic duties, and where married couples mingled their incomes, the women lost title to their earnings and possessions.[72] "Taking in boarders, nursing the sick, canning fruit, working as a seamstress for five dollars a week, running a hotel—such enterprises were all deemed part of the domestic labor the wife owed as the 'helpmate of her husband.'"[73] If pensions were any kind of substantial contribution to earnings, the public enforcement of heterosexuality through pensions regulations allowed some financial freedom that could allow women a choice other than remarrying. As early as the antebellum period, women's rights activists argued that marriage was legalized prostitution when women had no choice but to marry, given the low wages working women faced.[74]

Women began working for wages and supporting children in the late-nineteenth and early-twentieth centuries as wage labor replaced agricultural labor, often bringing the work home to children or children to the work.[75] Some women did have alternatives. Politically engaged elite women of the late-nineteenth and early-twentieth centuries sometimes arranged their lives so as to live with close female friends. Women such as Molly Dewson, active in Roosevelt's New Deal, and Eleanor Roosevelt lived with women, vacationed with women, and strategized about politics with women.[76] Among social welfare activists, very few of the white women were married.[77] Possibly these options were much more available to elite women—just as Kitzinger and Wilkinson note that playing with sexuality is perhaps more possible for women in relatively privileged positions today[78]—in jobs and social settings where they were

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103 YALE L.J. 1073, 1083–89 (1994) (discussing state Married Women's Acts); Stanley, *supra* note 69, at 481–82 (discussing state Married Women's Act).

71. *See* Stanley, *supra* note 69, at 495–96 & n.58 (citing Burke v. Cole, 97 Mass. 113, 114 (1867), and Brooks v. Schwerin, 54 N.Y. 343, 348–49 (1873)).

72. *See id.* at 496–97.

73. *Id.* at 496.

74. *See* Siegel, *supra* note 70, at 1120–22, 1127–29.

75. Practices varied by ethnicity and region of the country. For discussions of women at work, see THOMAS DUBLIN, TRANSFORMING WOMEN'S WORK: NEW ENGLAND LIVES IN THE INDUSTRIAL REVOLUTION (1994) (discussing the effect of the Industrial Revolution on women's work); ALICE KESSLER-HARRIS, A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES (1990) (discussing wages as an interpreter and consequence of gender inequality); Elizabeth H. Pleck, *A Mother's Wages: Income Earning Among Married Italian and Black Women, 1896–1911*, *in* A HERITAGE OF HER OWN (Nancy F. Cott & Elizabeth H. Pleck eds., 1979) (discussing the historical differences in the workplace between women of different ethnic groups).

76. *See* BLANCHE WIESEN COOK, 1 ELEANOR ROOSEVELT 339 (1992). John D'Emilio and Estelle Freedman discuss the late-nineteenth-century emergence of educated women who could afford to live apart from men, and did. D'EMILIO & FREEDMAN, *supra* note 62, at 188–97.

77. LINDA GORDON, PITIED BUT NOT ENTITLED 43, 113 (1993).

78. *See* Kitzinger & Wilkinson, *supra* note 35, at 454–57. However, cities have long had substantial working class lesbian communities even given the difficult circumstances of discrimina-

less subject to pressures for gender conformity. It was in the late-nineteenth century, too, that supervision of morals in the distribution of Civil War pensions became more entrenched.[79] State benefits were consolidated at a time when some women were first able to make their own livings, which possibly made the enforcement of heterosexual norms more important. Public policy, though, envisioned women as dependent and, indeed, employers justified paying women lower wages by the belief that most did not need the money.[80]

Public pensions were first available to men. As this article later discusses, public service in the nineteenth century was service which was regarded as dangerous; typically, military service, service as a volunteer fireman and, as public employment expanded, service as a policeman.[81] It was only after public employment expanded into fields that would employ women, such as school teaching, that it would include characteristics generally imagined as feminine rather than masculine. Courts imagined these occupations, such as volunteer firemen, in ways that had men as the central actors and, indeed, they were jobs largely held by men.[82] When men holding these jobs died—in the Civil War or, later, in industrial accidents—women could gain access to support payments (meager though they might have been) without having a man in the house, and they could gain those payments as a matter of statutory entitlement rather than as a matter of charity.[83] They gained those payments through a normatively enforced public fixing of heterosexuality, yet once the payments were gained, legal officials might have very little to say concerning their living arrangements.[84] Then, if heterosexuality were enforced, it would have been through gossip and whispers rather than through formal legal rules.

I next turn to a discussion of some of the cases concerning the constitutionality of soldiers' pensions, firemen's pensions, and workmen's compensation. These programs were all tested under state constitutional provisions that either explicitly stated or had read into them limits on state spending, allowing states to spend only for a public purpose.[85] In

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tion. *See* ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY (1994) (studying Buffalo, New York).

79. *See* discussion *infra* notes 228–29 and accompanying text (discussing the intrusive supervision of Civil War pensions).

80. *See* KESSLER-HARRIS, *supra* note 75, at 8–9.

81. *See* discussion *infra* Parts IV–VI.

82. *See, e.g.*, Trustees of Exempt Firemen's Benevolent Fund v. Roome, 93 N.Y. 313 (1883).

83. THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 107 (1992).

84. *Cf.* Susan Sterett, *Serving the State: Consitutionalism and Social Spending, 1860s–1920s*, 22 L. & SOC. INQUIRY 311, 345 (1994) (discussing that indigence was the only consideration when determining whether or not a mother should receive a pension).

85. *See, e.g.*, Fire Dep't v. Noble, 3 E.D. Smith 440, 451 (N.Y. Ct. C.P. 1854) (evaluating firemen's pension under N.Y. CONST. art. I, § 6); *see also infra* Part V (addressing the constitutionality of pensions).

addition, the Fourteenth Amendment's Due Process Clause[86] was interpreted by the Supreme Court to allow spending only for a public purpose.[87] Thus, the legitimacy of spending by any state could always be raised in court, whatever the content of a state's constitutional provisions. The reasoning was that to spend state money for something other than a public purpose was to spend tax money illegitimately, which in turn is to take property without due process of law or just compensation.[88] The requirement that states could only spend for a public purpose was considered to be a part of the general law, and Thomas Cooley synthesized that notion as such in his 1876 treatise on taxation.[89] Cooley tied the requirement to constitutional provisions prohibiting states from taking property without compensation.[90] However, many states also enacted specific state constitutional provisions after the Civil War prohibiting the states from giving gifts to private corporations or individuals, in part a response to the granting of privileges to railroads.[91] States evaluated pensions under these provisions as well.

In addition to examining the constitutionality of pensions and the way that masculinity and femininity were imagined in the courts, I want to illustrate the enforcement of heterosexuality through a discussion of Megan McClintock's work on the administration of civil war pensions.[92] The administration of pensions was not usually addressed as a constitutional matter in appellate courts. As McClintock's work so richly illuminates, the administration of pensions did, however, enforce an understanding of what constituted a family, an understanding of the proper behavior which made one a wife.[93]

IV. THE CONSTITUTIONALITY OF PENSIONS

By the time of the Civil War, pensions for military service from the federal government had been long established.[94] Federal pensions would

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86. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

87. *See* Loan Ass'n v. Topeka, 87 U.S. 655, 664–65 (1874).

88. *See Loan Ass'n*, 87 U.S. at 662–67.

89. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 100 (1876).

90. *Id.* at 73–74, 101.

91. *See* LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT 123–28 (1948) (discussing the development of state constitutional provisions); *see also* Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853) (allowing local governmental investment upon state legislative authorization); HARTZ, *supra*, at 113–23 (discussing *Sharpless* and noting that this decision provided the impetus for the amendment of the Pennsylvania Constitution). For a discussion of conflicts over railroads and American economic development, see GERALD BERK, ALTERNATIVE TRACKS (1992).

92. McClintock, *supra* note 1.

93. *See* discussion *infra* Part IV (discussing the work of Megan J. McClintock on Civil War pensions to discuss the relationship between pensions and perceived behaviorial patterns within marriages).

94. *See* WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 9–119 (David Kinley ed., 1918) (providing a thorough analysis of military pensions from the colonial times through the Civil War); WILLIAM H. GLASSON, HISTORY OF MILITARY PENSION LEGISLATION IN

become a matter for considerable public controversy, but as a legal matter they were widely accepted as constitutional. At the federal level, pensions were constitutional because they were incident to the federal power to conduct a war, and pensions provided an inducement to service.[95] At the state level, their constitutionality was much more open to question, precisely because conducting a war was a power of the federal government. In addressing the constitutionality of soldiers' pensions, many of the earliest state cases did not address the characteristic of the work; instead, payments to soldiers were addressed as a question of the circumstances in which the states could pay people for meeting obligations to the federal government[96]—assisting the federal government in conducting a war was no responsibility of the states. In later cases, the nature of the work was addressed. Even as early as 1865, the Wisconsin Supreme Court allowed the state to pay soldiers as a matter of gratitude for the service they had given to their country.[97]

In *United States v. Hall*,[98] the Supreme Court addressed the constitutionality of military pensions as a whole while inquiring into the constitutionality of a statutory provision establishing criminal sanctions for the embezzlement of pension funds by guardians.[99] Justice Clifford found a specific grant of power in the Constitution allowing pensions: Congress could declare war,[100] raise and support armies,[101] and enact laws "neces-

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THE UNITED STATES 1–68 (1900) (discussing pre-Civil War pensions); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 105 (1992) (noting the expansion of the the use of pensions from the time of the American Revolution to the Civil War).

95. *See* United States v. Hall, 98 U.S. 343, 351 (1878) (recognizing the constitutionality of military pensions, in part, through the government's power to declare war, U.S. CONST. art. I, § 8, cl. 11, and the power to "raise and support Armies," *id.* cl. 12); *see also* COOLEY, *supra* note 89, at 74, 99–100.

96. *See, e.g.*, Mead v. Acton, 139 Mass. 341 (1885); Kelly v. Marshall, 69 Pa. 319 (1871); Hilbish v. Catherman, 14 N.Y. 154 (1870); Booth v. Town of Woodbury, 32 Conn. 118 (1864); Tyson v. School Dirs., 51 Pa. 9 (1865).

97. Brodhead v. Milwaukee, 19 Wis. 658 (1865). In writing for the majority, Chief Justice Dixon stated:

> I think the consideration of gratitude alone to the soldier for his services, be he volunteer, substituted or drafted man, will sustain a tax for bounty money to be paid to him or his family. Certainly no stronger consideration of gratitude can possibly exist than that which arises from the hardships, privations and dangers which attend the citizen in the military service of his country . . . . Who will say that the legislature may not, in consideration of such services . . . give to the soldier or his family a suitable bounty after his enlistment, or even after his term of service has expired? I certainly cannot.

Brodhead, 19 Wis. at 687.

98. 98 U.S. 343 (1878).

99. *Hall*, 98 U.S. at 345–51.

100. *Id.* at 351; *see* U.S. CONST. art I, § 8, cl. 11 ("Congress shall have power . . . [t]o declare War . . . .").

101. *Hall*, 98 U.S. at 351; *see* U.S. CONST. art I, § 8, cl. 12 ("Congress shall have power . . . [t]o raise and support Armies . . . .").

sary and proper" to carry these powers into effect.[102] Furthermore, the long history of pensions was considered evidence of long-standing acceptance in the United States.[103] If long accepted, pensions were unlikely to be unconstitutional. Indeed, that they had been instituted in the first Congress showed that the founders had approved of the pensions.[104] Pensions and bounties, the Court reasoned, induced men to serve their country and were therefore necessary and proper to carrying on a war.[105] If bounties and pensions were legitimate, so were laws ensuring they went to the people who deserved them, including soldiers' heirs.[106] Justice Clifford wrote:

> Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements. Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled, or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out.[107]

What made pensions from the federal government legitimate was a loose understanding of exchange; men had served and could be paid, even if they had not been promised the payment before they served. Those payments became something akin to property—something they could pass on to their children. A man's service in war earned him payments in a way that exempted his children from seeking their payments as a matter of unearned charity from the state.

The early relationship between obligations of and to the states and the "general" government emerged in cases discussing public subsidies to the draft. After 1863, the first year of conscription, localities would pay money to raise volunteers to meet their towns' obligation to the federal government for the draft.[108] Alternatively, sometimes groups would pay the money, and the township would reimburse the group.[109] The obli-

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102. *Hall*, 98 U.S. at 351; *see* U.S. CONST. art I, § 8, cl. 18 ("Congress shall have power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .").

103. *Hall*, 98 U.S. at 346–51. As stated by Justice Clifford:

> Power to grant pensions is not controverted, nor can it well be, as it was exercised by the States and by the Continental Congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and has been continued without interruption or question to the present time.

Id. at 346.

104. *Id.* at 346, 350–51.

105. *See id.* at 351.

106. *Id.*

107. *Id.*

108. *See, e.g.*, Booth v. Town of Woodbury, 32 Conn. 118, 119 (1864) (adjudging the constitutionality of using town funds in establishing bounties to assist in satisfying the town conscription obligations); *see also* Hilbrish v. Catherman, 64 Pa. 154, 158 (1870).

109. *See, e.g.*, Tyson v. School Dirs., 51 Pa. 9, 10–11 (1865) (discussing Halifax township legislation establishing a bounty association and finding an act calling for the reimbursement of funds expended by the bounty association unconstitutional).

gation to the federal government was an obligation of the individual, not the locality. Therefore the localities could not constitutionally assist individuals, reimbursing them for expenses they incurred in meeting their draft obligations. But if a *collectivity* paid not just for its members but for the obligations of the town as a whole, reimbursing the collectivity was not spending for a private purpose but for the public purpose of assisting the male citizenry as a whole (usually simply described as the citizenry) to meet their obligations. State cases in the 1860s turned on these questions, not explicitly on the virtues of masculinity or concern for feminine dependency. When Cooley wrote on taxation, he first emphasized the limits on what the states could do,[110] while elsewhere urging the importance of the federal government's recognizing the importance of dangerous service in war.[111]

The individual quality of service emerged in the later cases, long after the Civil War. In 1912 the Connecticut court held pensions were unconstitutional because they would reward service long ago rendered, quite possibly in some other state.[112] In 1913 the Kentucky court in *Bosworth v. Harp*[113] held that state pensions for Civil War soldiers were constitutional.[114] In so doing, the court ascribed to men, women and children their proper roles, with men protecting women and children.[115] The court justified payment to Confederate soldiers by arguing that they had fought for a principle—the principle of state sovereignty.[116] Fifty years after the war, the court resurrected northern criticism of the South and of *Dred Scott*[117] in *Bosworth*, holding that such criticism justifiably alarmed Kentucky citizens in the 1850s.[118] Furthermore, the court referred to John Brown's raid on Harper's Ferry as an effort to "massacre . . . the women and children of the State,"[119] describing the women and children as "defenseless."[120] Pensions depended on masculine service which in turn rested on a contrast with the intrinsic helplessness of women and children. In that context, payment for service was justified. In conclusion, the court held:

> So long as the courage of the battlefield or the risking of one's life for his country is honored and it is the policy of the State to promote the

110. *See* COOLEY, *supra* note 89, at 76–83.

111. *Id.* at 100.

112. Beach v. Bradstreet, 82 A. 1030, 1032–34 (Conn. 1912).

113. 157 S.W. 1084 (Ky. 1913).

114. *Bosworth*, 157 S.W. at 1088 ("[A] tax is levied for public purposes [and therefore satisfies constitutional requirements] where the money is used to pay a pension granted in consideration of public services.").

115. *Id.* at 1086 (discussing John Brown's raid on Harper's Ferry).

116. *Id.* at 1085–87.

117. 60 U.S. 393 (1856).

118. *Bosworth*, 157 S.W. at 1087.

119. *Id.*

120. *Id.* at 1086 (arguing that John Brown's raid on Harper's Ferry "deeply stirred the South, for the defenseless women and children would be the first to suffer").

> loyalty and patriotism of the people by fostering the martial spirit, such services constitute a reasonable basis for classification. The honor due to the true and the brave is not limited to those who are successful in the struggle.[121]

The dissenting justice rather mildly pointed out that fighting for a losing side in a civil war was not service to the state.[122]

The irony of emphasizing the masculinity inherent in the dangerousness of war is that war puts men in a highly feminized position, making the maintenance of masculinity that much more difficult. Judith Lewis Herman argues that men's psychological troubles resulting from the trauma of war and women's psychological ills resulting often from the trauma from domestic violence and sexual abuse lead to the same complex of disorders.[123] Most poignantly, Pat Barker describes how men's trauma in World War I resembled poor women's everyday lives:

> Rivers [a military psychiatrist] had often been touched by the way in which young men, some of them not yet twenty, spoke about feeling like father to their men. Though when you looked at what they *did*. Worrying about socks, boots, blisters, food, hot drinks. And that perpetually harried expression of theirs. Rivers had only ever seen that look in one other place: in the public wards of hospitals, on the faces of women who were bringing up large families on very low incomes, women who, in their early thirties, could easily be taken for fifty or more. It was the look of people who are totally responsible for lives they have no power to save.
>
> One of the paradoxes of the war—one of the many—was that this most brutal of conflicts should set up a relationship between officers and men that was . . . domestic. Caring. As Layard would undoubtedly have said, maternal. And that wasn't the only trick the war had played. Mobilization. The Great Adventure. They'd been *mobilized* into holes in the ground so constricted they could hardly move. And the Great Adventure—the real life equivalent of all the adventure stories they'd devoured as boys—consisted of crouching in a dugout, waiting to be killed. The war that had promised so much in the way of "manly" activity had actually delivered "feminine" passivity, and on a scale that their mothers and sisters had scarcely known.[124]

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121. *Id.* at 1088.

122. In dissent, Justice Lassing noted:

> I concede that the Confederate soldiers were brave men, and that they fought with a courage and determination that challenged the admiration of the civilized world; but by the arbitrament of the sword every principle for with they contended was decided against them. The integrity of the Union was preserved. While theirs was a brave, gallant, and heroic fight, I cannot bring myself to believe that in their struggle for the lost cause they rendered either the national or the state government a "public service" within the meaning of these words as found in the Bill of Rights.

Id. at 1088 (Lassing, J., dissenting).

123. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 7–32 (1992).

124. PAT BARKER, REGENERATION 107–08 (1993).

Barker is discussing the First World War; the pensions I will discuss are from the Civil War. But the scarcity that Barker notes, the inability to care for people for whom one is responsible, also colored the Civil War. Noting these continuities contributes to the understanding that drawing rigid distinctions on the basis of gender is a matter of artifice.

V. PENSIONS AND THE NORMATIVE FAMILY

Men were concerned about enlisting for the army during the Civil War because they did not want to leave wives and children without material support.[125] During the first year of the Civil War, the federal government received more than enough enlistments,[126] but during the second year, the government did not, and the generally accepted reason was that men were concerned with what would happen to their families should they die.[127] When husbands, sons, and fathers were enrolled in the military and they had been the primary earners, their families could get public aid.[128] But public aid was not available if breadwinners died.[129] Facing the shortage of soldiers, in the summer of 1862 Congress expanded the money available to support families: it made mothers and sisters eligible for pensions and increased rates for widows and orphans.[130] In 1866, Congress made fathers and brothers eligible for pensions as well.[131]

Pensions also expanded substantially between 1865 and 1890, in part through relaxing evidentiary standards for proving family relationships.[132] McClintock argues, however, that the pensions laws eventually

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125. McClintock, *supra* note 1, at 456–58.

126. *Id.* at 460. This changed with the realization that the war would not be ended upon a single Union victory, but upon the "'complete conquest' of the South." *Id.* (quoting General Ulysses S. Grant on his impressions after the Battle of Shiloh).

127. *Id.* at 461.

128. *Id.*

129. *Id.*

130. *Id.* at 463 & n.15 (citing Act of July 14, 1862, ch. 166, § 2, 12 Stat. 566, 567). Section 2 of the Act of July 14, 1862 stated:

> [I]f any officer or other person named in [section one] has died . . . or shall hereafter die, by reason of any wound received or disease contracted while in the service of the United States, and in the line of duty, his widow, or, if there be no widow, his child or children under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to . . . to commence from the death of the husband or father, and to continue to the widow during her widowhood, or to the child or children until they severally attain to the age of sixteen years . . . .

Act of July 14, 1862, ch. 166, § 2, 12 Stat. 566, 567; *see also id.* § 3 (extending pension benefits to dependant mothers, subject to some constraints, when a deceased serviceman did not leave a widow nor legitimate children); *id.* § 4 (extending pension benefits to dependant, orphaned sisters when a deceased serviceman did not leave a widow, legitimate children, nor a mother).

131. McClintock, *supra* note 1, at 463 (citing Act of June 6, 1866, ch. 106, § 12, 14 Stat. 56, 58 (amending the Act of July 14, 1862, ch. 166, § 4, 12 Stat. 566, 567–68) (extending pension benefits to dependent fathers and brothers of deceased servicemen)).

132. *Id.* at 463 (citing Act of June 6, 1866, ch. 106, 14 Stat. 56; Act of March 3, 1873, ch. 234, 17 Stat. 566; Act of June 27, 1890, ch. 634, 26 Stat. 182 (relaxing evidentiary requirements for proving pension eligibility)).

instituted morality requirements for widows, making pensions not simply a matter of entitlement for women via their association with men, but also subjecting them to supervision by the state.[133]

Husbands were presumed to be the primary support, so when mothers needed the pensions they had to explain why their husbands could not support them.[134] Fathers claiming support had to explain why they could not support themselves.[135] In requiring explanation, the cases implicitly state what was expected: that men support themselves and their wives.[136] As McClintock states, "the order of family responsibility encoded in pension policy assumed that women first relied on husbands for support, then on sons."[137] When women worked for wages, their wages were generally lower than those of men, which in turn reinforced the need women might have had for their sons' support.[138] Furthermore, parents applied for pensions sometimes years after their sons had died; for when people aged it became less likely they could work for wages.[139] With the increase of time between the death of a son and application for a pension, evidentiary proof of support of the parents became more difficult.[140] Therefore, the pension expansions during the 1870s and 1880s required a lesser showing of support by allowing only a showing that a son would have been willing to support his parents.[141] The government sometimes simply assumed reciprocal parent/child obligations. For example, one mother had actually supported her son until he went to war.[142] After that, she became unable to work due to disability. The argument that gained her a

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133. *Id.* at 474–79 (discussing specific examples of state supervision of morality-based pension requirements).

134. *Id.* at 467.

135. *Id.*

136. *Cf. id.* at 467 & nn.25–26 (providing a number of examples of pension file reviews).

137. *Id.* at 469.

138. KESSLER-HARRIS, *supra* note 75; Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage of the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 135 (1994).

139. *See* McClintock, *supra* note 1, at 469.

140. *Id.*

141. *Id.* at 468 (citing Act of March 3, 1873, ch. 234, § 13, 17 Stat. 566, 571). As stated by section 13 of the 1873 act:

> [A] mother shall be assumed to have been dependent upon her son . . . if, at the date of his death, she had no other adequate means of support than the ordinary proceeds of her own manual labor and the contributions of said son or of any other persons not legally bound to aid in her support; and if, by actual contributions or in any other way, the son had recognized his obligations to aid in support of said mother, or was by law bound to such support, and that a father or a minor brother or sister shall in like manner and under like conditions, be assumed to have been dependent, except that the income which was derived or derivable from his actual or possible manual labor shall be taken into account in estimating a father's means of independent support . . . .

Act of March 3, 1873, ch. 234, § 13, 17 Stat. 566, 571.

For example, one woman received a pension despite the existence of only a single instance of support by her son in two years because that son wrote a letter evidencing his desire to provide support. *See* McClintock, *supra* note 1, at 468–69 & n.31 (describing the situation of Mary Harth).

142. *See* McClintock, *supra* note 1, at 470.

pension was that surely a son would not have left a mother to rely on charity once she was disabled.[143]

By 1890, Congress eliminated evidentiary requirements by allowing pensions for all parents, rather than requiring dependence.[144] The justification was no longer that parents had relied on that support, but instead that sons owed it to their parents and would have paid it had they not died in the service of their country.[145] The pretense, then, was that parents were not receiving payments from the state, that the state was allowing men to act in their appropriate masculine role, that of supporting their parents.

For widows, the evidentiary question was one both of marriage to the deceased soldier, and her continuing status as a widow.[146] Documenting marriage was not simple when the records were those of nineteenth-century localities.[147] Many people were married informally, and slaves were often forbidden from marrying at all.[148] Widows received pensions as long as they did not remarry; however, the Bureau of Pensions (no fools they) could see that this established an increased temptation to engage in sexual relations outside of marriage.[149] Therefore they wanted to

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143. *Id.* at 470–71.

144. *Id.* at 471 (citing Act of June 27, 1890, ch. 634, § 1, 26 Stat. 182, 182). Section 1 of the 1890 Act allowed the awarding of pensions to parents of deceased servicemen upon a showing that no widows or minor children were left and the parents were "without other present means of support than their own manual labor or the contributions of others not legally bound for their support." Act of June 27, 1890, ch. 634, § 1, 26 Stat. 182, 182.

145. *Id.* at 471 (citing *Notes of a Conference with Hon. William W. Dudley, Commissioner of Pensions*, H.R. MISC. DOC. NO. 48–43, at 24–25 (1884)). William W. Dudley, the Commissioner of Pensions in 1884, argued:

> [S]o far as determining the question of dependence is concerned, the law in its present form works great hardship in many deserving cases . . . . Now, I think the spirit of the pension law ought to reach far enough to provide for a mother who afterwards became dependent upon the labor of her own hands, or the assistance of others, upon the presumption that her son would have supported her had he lived. . . . [A]s the Government has taken him away I hold that the Government ought to try to make up, to some extent at least, to the dependent parent for the loss.

Notes of a Conference with Hon. William W. Dudley, Commissioner of Pensions, H.R. MISC. DOC. NO. 48–43, at 24–25 (1884).

146. McClintock, *supra* note 1, at 471.

147. *Id.* at 472. While the Bureau of Pensions preferred marriage records to substantiate marriage claims, they accepted other forms of evidence including witness testimony, child baptism records, or affidavits by marriage officiating individuals. *Id.* at 472 & n.39 (citing a number of congressional documents addressing pension evidentiary standards).

148. *Id.* at 471–73.

149. *Id.* at 476–77 (citing *Report of the Commissioner of Pensions for the Year 1868*, H.R. EXEC. DOC. 40–1, at 422 (3d Sess. 1868)). The Commissioner of Pensions noted:

> Serious abuses of privilege and flagrant violations of morality on the part of claimants under the present system exist, which seem to require that the Commissioner be clothed with discretionary power to adopt such means as may most certainly vindicate the purposes of equal justice and good morals.
>
> . . . .
>
> Widows, in increasing numbers, cohabit without marriage, refusing this solemn legal sanction for fear of losing their pensions thereby. Others live openly in prostitution for

supervise the morals of those widows receiving pensions, also contributing to the artifice that this was not state support but simply in lieu of a particular man—one who had performed his masculine duty.[150]

Given the lack of documentation of marriage, the Bureau of Pensions found themselves accepting evidence of cohabitation as evidence of marriage.[151] But they did require evidence of cohabitation, not just its assertion.[152] Claiming a pension when one had been a slave depended almost wholly on evidence of co-habitation.[153] Sometimes that evidence was supplemented with evidence of witnesses or, in one case, the testimony of the son of a former slaveholder that his father had allowed the applicant and her deceased husband to live together.[154] In 1864, Congress allowed pensions to those who were recognized as husband and wife and who had lived together for two years.[155]

Allowing pensions to women whose marriages had been informal meant that the Bureau felt compelled to concern itself with whether a marriage had been genuine and enduring, or whether it had been a brief affair.[156] Sometimes relationships fit into neither one nor the other category, and indeed, McClintock discusses one instance in which the Bureau of Pensions had to decide to which of two men a claimant had been married.[157] Annice Morgan was married to Jackson for three years, when he left to join the navy.[158] She claimed to have believed he was dead, and lived with Lemuel who then left to fight in the army.[159] Lemuel died, prompting Morgan to claim a pension as his widow.[160] But the Bureau of Pensions discovered that she had lived with Jackson after the War, caring for him until he died.[161] It was that marriage the Bureau decided had been

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> the same object. Thus is the government placed unwittingly in the strange attitude of offering a premium upon immorality, of which it should be relieved.

Report of the Commissioner of Pensions for the Year 1868, H.R. EXEC. DOC. 40–1, at 422, 450–51 (3d Sess. 1868).

150. *See* McClintock, *supra* note 1, at 476–77 (discussing the perceived need for and early attempts at restricting pensions to widows on moral grounds).

151. *Id.* at 472 & n.41 (citing files from the Bureau of Pensions).

152. *Id.* ("By accepting cohabitation as proof of valid marriages, pension administrators were following the lead of the antebellum judiciary . . . ." (citing MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 75, 79–80 (1985))).

153. *Id.* at 474.

154. *Id.* at 473 (describing the situation of Dilly Bostick).

155. For a fascinating discussion of what constituted evidence of a marriage among slaves, see Lea Vandervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1103–10 (1997).

156. McClintock, *supra* note 1, at 474.

157. *Id.* at 474–75 (citing documents in the pension file of Annice Morgan).

158. *Id.* at 475.

159. *Id.*

160. *Id.*

161. *Id.*

the genuine one because it was first and because she had lived with that man longer.[162]

In making those choices, the Bureau of Pensions enforced a normative order of monogamy. According to McClintock, part of what persuaded the Bureau that someone had been a genuine wife was that the woman had acted appropriately to the position of a feminine wife.[163] Annice Morgan, had nursed the man recognized to be her husband until he died, which the Bureau of Pensions cited as evidence in its decision.[164] In another case, the claimant had children with the man she claimed to be her husband, and she nursed him when he was ill.[165] Those scripts of what the Bureau of Pensions would recognize to be a legitimate union emphasized an enactment of femininity, one that we need not take to be natural to marriage or to being a woman.[166] But it was that work of caring, not farm work or financial support, that pension applicants would cite to when trying to persuade the Bureau that they were genuine wives. That anyone was persuading the Bureau that someone was a genuine wife demonstrates how much it was a script to be performed rather than a position anyone could make up as they went along. Until 1882, the Bureau of Pensions could only terminate the pension of a widow on her remarriage, not by virtue of her cohabiting with someone.[167] Despite efforts on the part of the Bureau of Pensions, Congress was reluctant to allow them to supervise the home lives of pensioners.[168] But after 1882, the Bureau could terminate a woman's payments for cohabiting with a man.[169] The law of state benefits, as the benefits expanded, codified normative heterosexual family life.

In a class I taught, students and I had discussed what marriage was. A student in the class had friends who called themselves married but because they were lesbian the marriage was not recognized by the state. The student could not understand what the fuss was about in some Euro-

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162. *Id.* As a result of finding that the Morgan-Jackson union represented the legitimate marriage, Morgan's pension claim, based upon the Morgan-Lemuel relationship, was dropped by the pension examiner. *Id.*

163. *Id.* at 476 ("[B]ecause she acted like a wife, pension administrators restored her pension.").

164. *Id.* at 475 & n.46 (citing documents of the Bureau of Pensions and records of the Veterans' Administration).

165. *Id.* at 476 (discussing the situation of Kate Staplin, as evidenced in Staplin's pension file).

166. *See* Butler, *supra* note 9, at 21.

167. McClintock, *supra* note 1, at 476–77; *see, e.g.*, Act of July 4, 1864, ch. 247, § 7, 13 Stat. 387, 388 ("[O]n the remarriage of any widow receiving a pension, such pension shall terminate, and shall not be renewed should she again become a widow.").

168. McClintock, *supra* note 1, at 477 & n.50 (citing CONG. GLOBE, 40 Cong., 3d Sess. 678 (1869) (statement of Rep. Perham); *id.* at 679 (statement of Rep. Boyden); *id.* at 641 (statement of Rep. Schenck); *id.* at 641 (statement of Ebon Ingersoll)).

169. *Id.* at 477 (citing Act of Aug. 7, 1882, ch. 438, 22 Stat. 345, 345 (stating that "open and notorious adulterous cohabitation" will be grounds for termination of pension benefits)).

pean Court of Human Rights cases;[170] if people called themselves married, they were. Some students tried to define the essential qualities of marriage, such as monogamy, or living together with affection over the course of the marriage. Some mentioned that the purpose of marriage was reproduction, so the capacity for sexual reproduction must be present. Other students quickly rejected this, saying reproduction might once have been the point of marriage but it no longer was. The solution to some students was to allow anyone who wants to call themselves married to do so, and to abolish the civil status.

The students are not alone in finding a teleology to marriage. John Finnis argues that sexuality is only properly deployed when it is open to the possibility of reproduction; otherwise sexual partners would be using each other simply for pleasure, not as ends in themselves.[171] Marriage, according to Finnis, is a non-instrumental communion, offering companionship between two people.[172] Openness to procreation is "the intrinsic fulfillment of [that] communion;"[173] because the communion does not require children, marriage partners can have that communion even if they cannot have children. That would seem to suggest that gay and lesbian marriage would fit in his teleology, but it does not. Procreation between partners is impossible as a matter of biology within gay and lesbian couples, not just an accident of infertility. Finnis finds this distinction persuasive,[174] though possibly infertile heterosexual couples do not, as Dan Savage's discussion of adoption points out.[175] Finnis's analysis is explicit about the teleology of marriage;[176] he might well have approved of the Bureau of Pensions' effort to decide who was truly married.

I then suggested to students that the criteria of affection and monogamy might at times be aspirations, though that was not always the case, and that the criteria certainly did not describe married reality all the time for most married couples. Marriage, to be wholly bare bones and pedantic about it, is nothing more or less than a legally recognized status. To say that it is anything other than that has often implied a teleology along the lines of what Finnis argues for, one based in procreation. From the data McClintock provides, marriage has been enforced via state benefits

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170. Supranational courts have in recent years addressed what constitutes a marriage. The European Court of Human Rights (ECHR) judges disputes under the European Convention on Human Rights that arise in countries that are signatories to the Convention. The Convention includes a right to family life, and under that right applicants have challenged laws that in effect forbid transsexuals from marrying based on birth registration and prohibitions on same sex marriage. *See* Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 5 (1990).

171. John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 27–29 (1995).

172. *Id.* at 27.

173. *Id.*

174. *Id.* at 27–29, 30.

175. *See Gay Adoption*, *supra* note 11.

176. *See* Finnis, *supra* note 171, at 27–30 (addressing the teleology of marriage in part through an examination of ancient Greek thoughts on homosexuality).

to fit with a teleology, and not only based in procreation.[177] There was a proper way to be a wife and a proper way to be married. Such propriety involves not just a particular variety of sexual intercourse, but instead caretaking through illness and long term living together. That too would seem to suggest that gay and lesbian partnerships could count for the purposes of state benefits, but the caretaking is taken to be appropriate for women, not men, and more specifically, to a woman taking care of a man.

I next address shifts in the evaluation of pensions for firemen, where the courts turned from evaluating payments as a matter of justified exchange between those particular groups who benefited to an evaluation of public service and its hazards to those who engaged in it. Like evaluation of the constitutionality of state pensions for soldiers, changes represented shifts in evaluations of the obligations of citizenship and the relationship between citizen and government.

VI. FIREMEN AND POLICEMEN

Before the mid-nineteenth century, employees were responsible for only a small percentage of the work done on behalf of the state; even police were not instituted until the mid to late-nineteenth century.[178] Major cities (such as New York) relied on volunteer firemen and compensated them in two forms: first, firefighters were exempt from military service,[179] and second, municipalities taxed fire insurance companies and allocated the money directly to firemen's charities, which often meant old age homes.[180] The military exemption demonstrates how much this service was tied to military service in the public characteristics it assumed. To the extent that military pensions rested on a justification that they induced men to serve by guaranteeing their dependents would be cared for, and that they rewarded courage and bravery, pensions for firemen could be understood to rest on the same basis.

The second benefit, allocating money to charities, was challenged, even before the Civil War. As shown by the following discussion, the courts addressed what constituted a public purpose. In characterizing what was a public purpose, courts initially drew on an understanding of exchange, but not between the general public and the firefighters; instead, the courts noted that the insurance companies benefited from firefighting, so it was equitable to make the insurance companies pay.

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177. *See* McClintock, *supra* note 1, at 471–79 (discussing mid-nineteenth-century perceptions of marriage as articulated by Congress and enforced by the Bureau of Pensions).

178. *See* ERIC MONKKONEN, POLICE IN URBAN AMERICA, 1860–1920, at 31 (1981).

179. *See* H.L. Wilgus, *Constitutionality of Teachers' Pensions Legislation*, 12 MICH. L. REV. 27, 31 (1913).

180. *Id.* at 32.

New York had provided for firemen since colonial times, first providing exemptions from military service for serving as firemen, then providing public funds for pensions.[181] From 1849, the legislature required that two percent of the premiums collected by foreign insurance companies in any city be paid to the fire department or corporation of firemen of the city.[182] In an 1854 case, *Fire Department v. Noble*,[183] this tax was challenged as an unconstitutional taking of property for a private purpose because it benefited a private corporation.[184] In *Noble*, the court held that it did not.[185] In 1852, Illinois enacted a provision similar to New York's, in which tax revenues from insurance payments made to companies incorporated outside Illinois would go to those who were injured and members of the private firemen's association.[186] This was immediately challenged as a violation of public purpose requirements, and in 1859 the Illinois Supreme Court in *Firemen's Benevolent Ass'n v. Lounsbury*,[187] upheld it as serving a public purpose.[188]

In addressing the constitutionality of these targeted taxes, these courts did not discuss masculinity and dangers of service; they did not address the worthiness of beneficiaries at all. Instead, they addressed taxation as a matter of what historian Einhorn calls "segmented logic":[189] those who benefit should pay, and there is little sense of a more common general benefit. The courts reasoned that insurance companies were the direct beneficiaries of firefighting, and therefore states could require them to pay.[190] As Robin Einhorn notes, this form of taxation served two purposes: it raised money for the Firemen's Benevolent Association, but it did so in a way that gave a competitive advantage to local insurance companies.[191]

The cases addressed by states after the Civil War spoke much more of general public benefit, and indeed Einhorn argues that the Civil War brought a sense of common purpose to politics.[192] It is in this later period that cases discussed the characteristics required of beneficiaries, emphasizing the importance of the courage required for the work and the

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181. *Id.* at 31–32.

182. Act of March 30, 1849, ch. 178, 1849 N.Y. Laws 239. Previously, the state collected two percent of the foreign insurance premiums, but the collected money was paid directly to the state. Wilgus, *supra* note 179, at 32.

183. 3 E.D. Smith 440 (N.Y. Ct. C.P. 1854); *see also* Fire Dep't v. Wright, 3 E.D. Smith 453 (N.Y. Ct. C.P. 1854) (utilizing the *Noble* decision).

184. *See Noble*, 3 E.D. Smith at 453.

185. *Id.* at 451–52.

186. *See* Firemen's Benevolent Ass'n v. Lounsbury, 21 Ill. 511, 511–12 (1859) (describing the Act of June 21, 1852).

187. 21 Ill. 511 (1859).

188. *Lounsbury*, 21 Ill. at 515–16.

189. EINHORN, *supra* note 2, at 25–26, 149–50; *see Lounsbury*, 21 Ill. at 515–16.

190. *See Lounsbury*, 21 Ill. at 513; *cf. Noble*, 3 E.D. Smith at 451–52.

191. EINHORN, *supra* note 2, at 149–50.

192. *Id.* at 224.

women and children depending on those who risked their lives.[193] No talk of the duty of men or the courage required of them appeared in the early cases, only a straightforward understanding of the benefits accruing to fire insurance companies and their concomitant obligations.[194] When the cases began to analyze the courage of men and dependence of women is when, as Nancy Fraser and Linda Gordon argue, the meaning of wage labor first came to connote masculinity and independence rather than dependence.[195] The discussion of masculinity appeared as sexual identities were beginning to be understood as fixed characteristics of human beings, rather than as descriptions of behavior in which people engaged. I would not argue that the general intellectual change in perceptions of sexual identity caused the changes in how the courts understood the value of pensions. Rather, the Civil War transformed relations of federalism and of politics enough to account for the transformation in focus. However, the heightened sense of masculinity and femininity in the cases does fit with the naming and fixing of sexual identities that John D'Emilio and Estelle Freedman ascribe to the late-nineteenth century.[196]

A touchstone case out of New York in 1883, *Trustees of the Exempt Firemen's Benevolent Fund v. Roome*,[197] once again challenged a tax on private insurers to create a pension fund for volunteer firemen.[198] By this time, localities were beginning to rely on employees for work rather than on the older system of having direct beneficiaries pay for services. However, *Roome* raised a challenge to the older system of pensions. One of the first and most important civil service cases under the anti-gift provisions in state constitutions, therefore, actually addressed older spending forms rather than new funding directly from city councils or state legislatures to employees. Even so, the court held that the pensions were constitutional, explaining:

> With the growth of the city the number of the firemen increased, and the amount and danger of their service. The old engines, moved with difficulty and cumbrous and rude in construction, gave place to better machines, and the service improved as the demand upon it grew. The dangers of the work were obvious, and a courage and daring which has gone into history began to leave behind it men who were maimed

193. *See, e.g.*, Trustees of the Exempt Firemen's Benevolent Fund v. Roome, 93 N.Y. 313, 319–20 (1883); *see also infra* note 197–199 and accompanying discussion (examining *Roome*).

194. *See Lounsbury*, 211 Ill. at 511 (discussing the constitutionality of benefit legislation, but failing to discuss the courage of firemen and hazards of service); Fire Dep't v. Noble, 3 E.D. Smith 440 (N.Y. Ct. C.P. 1854) (discussing firemen's pension issues in a very antiseptic manner).

195. Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 316–18 (1994).

196. *See* D'EMILIO & FREEDMAN, *supra* note 62, at 223–29.

197. 93 N.Y. 313 (1883).

198. *Roome*, 93 N.Y. at 313.

> and crippled in the public service, and widows and orphans deprived of their natural protectors and reduced to poverty and want.[199]

The tax was therefore not a grant of a special privilege to a private corporation or association, nor was it a gift from the state to a private undertaking. The firemen were not state employees and indeed in that sense they constituted a private organization. But drawing on an older legal tradition, whether one was in public service or not depended on the function one served, not the accident of who was an employer or owner. *Roome* focused less on the justice of making the insurance companies pay for the firemen, choosing instead to highlight the needs of dependents and bravery of men. Masculinity implied dangerousness and financially providing for a heterosexual family.

The world of firemen was actually very male-defined. In the cities, firemen did not just join together to put out fires. Fire companies were outgrowths of working men's clubs.[200] They staged minstrel shows, putting on persona along with blackface that they did not assume in daily life.[201] Bowery boys, the New York City working class men, some of whom were volunteer firemen, lived in a very male world, where their primary identifications were with other men.[202] Bowery boys also went out with women, and were known for their rakish ways.[203] Defining masculinity may have required dangerousness, but in return the world in which men spent their time could be very male-defined.

States also began to consider pensions for policemen. In the early-twentieth century, Illinois considered expanding pensions for police to police matrons and to police operators, who worked within the police station.[204] Members of the state legislature threatened a constitutional case against the expansion; the *Chicago Tribune* argued that the only police jobs that deserved pensions were those which were dangerous, thereby excluding both operators and police matrons.[205] In 1916 the Illinois Supreme Court held police pensions to be constitutional, saying that it was a way of "retiring from the public service those who have become incapacitated from performing the duties as well as they might be performed

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199. *Id.* at 320; *see* Wilgus, *supra* note 179, at 33.

200. *See* ERIC LOTT, LOVE AND THEFT 81–85 (1995); SEAN WILENTZ, CHANTS DEMOCRATIC 259–61 (1984).

201. LOTT, *supra* note 200, at 80–85.

202. *Id.*

203. *Id.* at 81.

204. *See* Act of July 1, 1911, 1911 ILL. LAWS 170 (amending the Act of April 29, 1887, 1887 ILL. LAWS 122, by adding section 3a which extended police pensions to police matrons); *see also* Lyons v. Police Pension Bd., 99 N.E. 337, 337–38 (Ill. 1912) (discussing the original Act and the amendment and finding the amendment constitutional).

205. *House Firm on Changes in Police Pension Bills*, ILL. ST. J., May 10, 1911, at 1; *Police Pensions Hit Snag*, CHI. TRIB., May 10, 1911, at 4.

by younger or more vigorous men."[206] In 1921, the Alabama Supreme Court also praised the work of the hazardous services as worthy of reward:

> [T]he legislature may provide a system, whereby municipalities . . . can increase in efficiency a department designed to protect life and property, by providing for the members of its fire departments, their wives and little ones, after the term of active service has been ended, either by death or age, to the end that the public may retain in this hazardous service men of the most faithful and efficient class . . . .The compensation thus paid, by whatever name called, is not a gratuity . . . .[207]

Both association in a heterosexual family and proper masculinity were present in the Alabama court's explanation of what made pensions allowable. First, state benefits were available as earned to women who were married to firemen and to their children.[208] Second, masculinity was characterized as a question of hazardous service; that hazardous service is what earned a pension.[209] Even having earned a pension, a man could be in a somewhat ambiguous position: they were often paid pensions because they had been disabled or they were too old to serve. State pensions were a recognition of masculinity but they could shade into compensation for feminizing injuries.[210]

It would be possible to characterize the cases concerning pensions for firefighters and policemen as cases concerning gender, rather than sexual orientation, were one to focus on the distinction. The discussion of hazardousness—of facing danger—would seem to fit neatly within what we have long thought of as characterizations of gender. However, such gender stereotyping operated within a regime of heterosexual family life: the state provided pensions for the wives and children. Dangerousness was masculine in the context of having a wife and child to care for; women and children were the backdrop against which men enacted masculinity. The masculine characteristics were difficult to understand outside a governing system of heterosexual families, just as the feminine characteristics of caring and nursing were defined as wifely characteristics in the cases concerning who was a wife for the purposes of military pensions. Caring and nursing for a man made one his wife; they did not make one a woman.

Women who were not wives, but rather mothers without husbands, were forced to rely on other forms of state relief, depending on the reason a woman did not have a husband. Nineteenth-century tort litigation occasionally compensated women who had lost husbands in industrial

206. People *ex rel.* Kroner v. Abbott, 113 N.E. 696, 698 (Ill. 1916).

207. Cobbs v. Home Ins. Co., 91 So. 627, 629 (Ala. Ct. App. 1921).

208. *Cobbs*, 91 So. at 629.

209. *Id.*

210. *See* Seth Koven, *Remembering and Dismemberment: Crippled Children, Wounded Soldiers, and the Great War in Great Britain*, 99 AM. HIST. REV. 1167, 1191–92 (1994) (discussing injury, war, and feminization in Britain).

accidents.[211] Local systems of poor relief and almshouses also sometimes housed women.[212] After 1900, activists argued that women with children to support should receive payment from the state. While advocates called these pensions, in line with soldiers' and civil servants' pensions,[213] in the early-twentieth century states more often considered them unearned charitable payments. I will outline questions concerning the constitutionality of these pensions in the next section.

VII. PENSIONS FOR WIDOWS

Between 1910 and 1920, forty states instituted payments to single mothers, though the funding in most states meant that very few women actually received payments.[214] Some advocates argued that payments should be seen as something earned, that women were doing a public service in raising children, and that the polity had an obligation to encourage mothers to do a good job of rearing children by paying them for the work.[215] However, most states enacted the mothers' pensions on the basis of charity, paid to women who could not otherwise support themselves and who proved themselves worthy.[216] In Illinois pensions were enacted on a more universal basis,[217] but they were quickly changed to a much more restrictive program.[218] In 1914, Arizona also enacted a broad

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211. *See* SKOCPOL, *supra* note 83, at 290.

212. *Cf.* ROBERT H. BREMNER, THE PUBLIC GOOD: PHILANTHROPY AND WELFARE IN THE CIVIL WAR ERA 150–53 (discussing poorhouses and other means of housing the indigent).

213. *See* MOLLY LADD-TAYLOR, MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890–1930, at 143–48 (1994).

214. *See id.* at 148 (noting the financial difficulties associated with the mothers' pensions); SKOCPOL, *supra* note 83, at 424 (noting the emergence of mothers' pensions in forty states by the year 1920).

215. *See* LADD-TAYLOR, *supra* note 213, at 135–36, 143–48; *see also* SKOCPOL, *supra* note 83, at 426 (describing the fears of Mary Richmond, a prominent charity offical, that mothers' pensions evidenced the "same mixture of motive"—payment of a debt versus charity—as experienced with soldiers' pensions). Ladd-Taylor differentiates between three groupings of early-twentieth-century advocates: sentimental maternalists, progressive maternalists, and feminists. *See* LADD-TAYLOR, *supra* note 213, at 7. In discussing women's pensions, she notes that all three groups supported the pensions, but for different reasons—sentimental maternalists sought to preserve maternal dignity, assist poor women in fulfilling parental responsibilities, and prevent juvenile delinquency; progressive maternalists viewed the pensions as a means of coping with poverty; and feminists as a means of renumeration. *Id.* As a result of these different rationales underlying the groups' support of mothers' pensions, the maternalists sought pension coverage only for those individuals without the "support of a male breadwinner," while the feminists argued for pension coverage for all mothers. *Id.*

216. *See* LADD-TAYLOR, *supra* note 213, at 138.

217. *See* ILL. REV. STAT. § 175 (Hurd 1912). In pertinent part, the Illinois statute, the first of its kind, stated:

> If the parent or parents of such dependent or neglected child are poor and unable to properly care for the said child, but are otherwise proper guardians and it is for the welfare of such child to remain at home, the court may enter an order finding such facts and fixing the amount of money necessary to enable the parent or parents to properly care for such child, and thereupon it shall be the duty of the County Board . . . to pay to such parent or parents . . . the amount so specified . . . .

Id.; *see also* SKOCPOL, *supra* note 83, at 428.

218. *See* ILL. STAT. ANN. ch. 37, ¶ 3416(1)–(21) (Callaghan 1913–1916); *see* SKOCPOL, *supra* note 83, at 429. For example, the amended version limits pension disbursements to "[a] woman

pension plan which included a provision for the elderly.[219] Two years later, the Arizona Supreme Court struck down these pensions in *State Board v. Buckstegge*,[220] because, in part, they did not adhere to a wholly charitable framework.[221] Because the program was not closely enough means-tested, it gave support to too many women.[222] The Chief Justice writing for the majority stated:

> I think the theory upon which a pension system of this kind must be sustained is that the state owes a duty to take care of the unfortunate members of society who, by reason of age or mental or physical infirmity, are unable to care for themselves, and are not the owners and possessors of property sufficient to sustain them from want and beggary. Certainly a citizen and taxpayer ought not to be made or required to help pay pensions to those who have enough and to spare of the world's goods. I can think of no principle of law or justice that could be invoked to sustain a law that required him to do so.[223]

In other words, a plea of total dependency was the price of social spending outside service to the state. Women as mothers and not wives of civil servants or soldiers were analogous to the ill and disabled rather than to civil servants or soldiers. By its reasoning in *Buckstegge*, the Arizona Supreme Court did not accept that women were serving the state by raising children.[224]

In sharp contrast with some of the soldiers' pension cases, courts addressing mothers' pensions did not provide homage to the work of mothering as that evidenced in courts addressing the patriotic work of soldiering.[225] In *Buckstegge*, the appellants challenged the program as not

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whose husband is dead or whose husband has become incapacitated for work by reason of physical or mental infirmity . . . provided such woman has had a previous residence for three years in the county . . . and is the mother of a child or children." ILL. STAT. ANN. ch. 37, ¶ 3416(2).

219. *See* Act of Nov. 3, 1914, 1915 Ariz. Sess. Laws 10, *reprinted in* State Bd. v. Buckstegge, 158 P. 837, 838 (Ariz. 1916). The Arizona law stated in part:

> [I]n order to care for aged people and people incapable of earning a livelihood by reason of physical infirmities, and widows or wives whose husbands are in penal institutions or insane asylums, they being mothers of children who are under the age of sixteen (16) years, a system of pensioning is hereby established.

Act of Nov. 3, 1914, 1915 Ariz. Sess. Laws 10 § 2.

220. State Bd. v. Buckstegge, 158 P. 837 (Ariz. 1916).

221. *Buckstegge*, 158 P. at 841–42. The court also recognized that the title of the legislation submitted to voters did not adequately convey that the pension plan would supplant almshouses currently used to house the poor, in violation of the Arizona Constitution. *Id.* at 840–41; *see* ARIZ. CONST. art. IV, § 13 ("Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title . . . .").

222. *See Buckstegge*, 158 P. at 841–42.

223. *Id.* at 842 (Ross, C.J.).

224. *See id.*

225. *Compare, e.g., id.* at 838–42 (addressing mothers' pensions), *with* Bosworth v. Harp, 157 S.W. 1084, 1085, 1087–88 (Ky. 1913) (addressing soldiers' pensions). For example, the *Bosworth* court, in finding that soldiers' pensions applied to soldiers fighting for the Confederacy, ended their decision with the following statement:

generous enough, and as replacing almshouses with inadequate payments.[226] In emphasizing that point, the appellants likened pensions to leaving a baby on the street with $6 pinned to her (the monthly amount paid for a child), and saying the father was no longer liable for support.[227] That is, the state was directly taking the place of a man. The state could not meet its obligations with a set monthly payment anymore than a father might have.

Women receiving pensions had to conform to an image of heterosexuality, but they need not have a man around. In return for payments, the state often provided quite intrusive supervision, checking to see if one had a man in the house (which was unacceptable).[228] Protection had its price; when one gains protection, one depends on the protector's rules.[229]

Pensions law was one arena that structured what it meant to be a family. What it meant to be a family reinforced heterosexual norms: women lived with men and were dependent on them, and children were dependent on fathers' income and mothers' care. Men were independent, including when they called upon state payments, because they had earned those payments. The task for this article has been to make some move toward understanding what has marked straightness, linking that to the emergence of individualized state benefits in the late-nineteenth and early-twentieth centuries. Because we live in a world where straight culture dominates, we are, on the whole, well aware of these markers. I simply want to set these characteristics into a different context, one that highlights their connection to straightness. I would not argue that the availability of state benefits cause heterosexuality or is a primary reason for men and women living together. I only want to note how state programs might reinforce it.

The late-nineteenth century was a time in which sexual identities were becoming less flexible and more obviously marked, in particular for gay men. For wealthy women, sexual ambiguity was possible, and in-

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> So long as the courage of the battle field or the risking of one's life for his country is honored, and it is the policy of the state to promote the loyalty and patriotism of the people by fostering the martial spirit, such services constitute a reasonable basis for classification. The honor due to the true and the brave is not limited to those who are successful in the struggle. Greece still honors the Spartans who defended the pass at Thermopylae. The names of Wallace and his comrades are yet household words in Scotland. They who died at the Alamo are honored of all Americans. The state may show that the republic is not ungrateful to these men not only by erecting monuments to them when dead or placing flowers on their graves, but it may with equal propriety gladden their hearts while living and in their infirmity give them bread.

Bosworth, 157 S.W. at 1088.

226. *See Buckstegge*, 158 P. at 841.

227. Brief for Appellant, State Bd. v. Buckstegge, 158 P. 837 (Ariz. 1916) (No. 1456) (on file with author).

228. *See* SKOCPOL, *supra* note 83, at 467–68.

229. *See* WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 168–70 (1995) (discussing the state and protection).

deed virtually necessary for a career, since it was difficult to care for a man and children while also being active in, for example, social welfare work. Linda Gordon notes that many of the white women active in social welfare in national political networks were unmarried.[230] While the late-nineteenth century might have provided some flexibility for upper class women, legal practices were working at fixing identity, and state payments contributed. Megan J. McClintock argues that the administration of civil war pensions fixed a normative family, one that had all the trappings of state-recognized legitimacy.[231]

VIII. CONCLUSION

The late-nineteenth century developed an understanding of homosexuality based on a medical model in which it was a distinctive perversion and a quality of individuals. The effect was to both make people more reticent in personal letters and, perhaps paradoxically, to make sexuality more often spoken of as a way of policing it. At the same time, governing was becoming less a matter of ensuring that those who benefited paid and more a matter of ensuring that what the government did was a matter of general benefit. The more direct relationship implied in the revised supervision of public purpose—from whether a tax targeted on fire companies, or reimbursement to a collectivity for raising draft substitutes, was public to whether the individual men had earned the pension from the payments—meant that qualities implied in the work, rather than only the nature of the exchange, would be examined. Celebrating qualities required to be a soldier or fireman accompanied, neither causing nor caused by, changes in political relations more generally.

Clearly, the cases we have seen from the latter part of the nineteenth and the early-twentieth centuries discuss a marked femininity and masculinity. These markers of dangerousness and dependence would usually be discussed as markers of gender rather than sexual orientation, and indeed I have done so in another article.[232] Linda Gordon and Nancy Fraser expand our understanding of what is implied by gender by noting how dependence and independence have been interpreted in changing ways historically, arguing that they have been marked as feminine and masculine.[233]

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230. GORDON, *supra* note 77, at 111–13. It was more common, however, for African American activist women to be married and have children. *Id.*

231. McClintock, *supra* note 1, at 479–80; *see also* discussion *supra* Part V (addressing pensions and the normative family through a discussion of McClintock's work on Civil War and post-Civil War pensions).

232. Sterett, *supra* note 84, at 315–18 (discussing women as dependents of men and recognizing this as a marker of gender, rather than sexual orientation).

233. Fraser & Gordon, *supra* note 195, at 316–18.

Masculinity and femininity were, in the pensions cases, associated with living in a heterosexual family. Women were dependent—that was an acceptable feminine characteristic; but they were dependent on men as "their natural protectors,"[234] as the New York Firemen's cases had it. I would argue we could as easily see these cases as being about sexual orientation; that is, they concern how to be a heterosexual man or woman and how to keep one's part in the marriage bargain. Switching frames from gender to sexual orientation is not a simple substitution of one term for another, as though neither signifies very much. For as we have seen, markers of dependence went along with the fact that clients were women, which in turn went along with their having been dependent on a man—a man who could no longer be depended upon. Andrew Koppelman argues that sexual orientation discrimination is "really" gender discrimination, because gay men and women are discriminated against on the basis of traits associated with femininity or masculinity.[235] I would argue that there is no "really," except for the convenience of making a plausible claim in Title VII.

Gender discrimination cannot be wholly seen as a matter of discrimination on the basis of sexual orientation, because feminine, straight women are sometimes discriminated against precisely because of their femininity. But because evaluating sexual orientation is a matter of measuring "proper" ways to behave, it is about the imposition of gender. We can choose to highlight or emphasize one framework over another, but to say something is one or the other implies a preexisting differentiation of the categories I find implausible.

234. Trustees of the Exempt Firemen's Benevolent Fund v. City of New York, 93, N.Y. 313, 320 (1883) ("The dangers of [firefighting] were obvious, and a courage and daring which has gone into history began to leave behind it men who were maimed and crippled in the public service, and *widows and orphans deprived of their natural protectors and reduced to poverty and want.*" (emphasis added)).

235. *See* discussion *supra* notes 18–28 and accompanying text.